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# Installment Sales of Real Estate in Colorado

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# Installment Sales of Real Estate in Colorado

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The recent decision of our supreme court in *Cavos v. Geihsler*[1] makes pertinent a reconsideration of the law concerning installment sales of real estate in Colorado under the common form of contract where (1) the making of specified payments of purchase price is a condition precedent to the conveyance of title, (2) time of payment is of the essence and (3) express provision is made that in case of default in payment, the vendor may upon specified notice retain all payments made as liquidated damages with forfeiture of all rights of the purchaser.

This form of contract, when the courts permit its enforcement, is the poor man's friend. The man of means can buy his property for cash or make sufficient down payment to permit the financing of the balance by mortgage. By the form of contract above mentioned the man without sufficient cash payment to protect his mortgagee against delay and taxes and expense of foreclosure in case of possible default, is able virtually on the basis of rental payments to accumulate an increasing equity in his home, which ultimately grows into full ownership and makes him an interested and established citizen of his community. A very large percentage of modest homes are purchased under such contracts and their legal status should be stabilized.

While it is impossible to harmonize the decisions from every jurisdiction on this subject, the forfeiture and liquidated damage provisions of such contracts have generally been considered valid and enforceable as written, both by the text writers and the courts.[2] This right is subject to the common equitable defenses of fraud, excusable ignorance, surprise, accident or mistake,[3] and a vendor may so act as to lose his

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[1]123 P. (2d) 822 (Colo., 1942).

[2]POMEROY, EQUITY JURISPRUDENCE (3d ed.), sec. 455; 2 BLACK, RESCISSION, 1122 sec. 439; 2 WARVELLE, VENDORS (2d ed.), sec. 807; 27 R. C. L. 448, 613, 644, 664. Leading cases are Glock v. Howard & Wilson Colony Co., 123 Calif. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17 (1898); Oconto Co. v. Bacon, 181 Wis. 538, 195 N. W. 412, 40 A. L. R. 175 (1923). See also, from nearby states, Thiel v. Miller, 122 Wash. 52, 209 Pac. 1081, 26 A. L. R. 523 (1922); Suburban Homes Co. v. North, 50 Mont. 108, 145 Pac. 2, Ann. Cas. 1917C 81 (1914); Coe v. Bennett, 46 Ida. 62, 266 Pac. 413 (1928); Malmstrom v. Apartment Co., 74 Utah 206, 278 Pac. 811 (1929); Kemmerer v. Title and Trust Co., 90 Ore. 187, 175 Pac. 865 (1918); Bentley v. Keegan, 109 Kans. 762, 202 Pac. 70 (1921). And see also Hansbrough v. Peck, 4 Wall. (72 U. S.) 479, 18 L. ed. 520 (1866).

[3]27 R. C. L. 667; Oconto Co. v. Bacon, *supra* note 2.

right to declare a forfeiture by waiver or estoppel.[4] Defenses, however, are based not on any past performance of the now defaulting purchaser, but on some inequitable conduct of the vendor or on some equitable excuse for vendor's failure to perform. In some jurisdictions it is held that tender of payment after forfeiture declared is too late; in others, equity considers such tender on answer to suit to decree forfeiture sufficient, since what vendor sought was his purchase price.

Such provisions are held to be for the benefit of the vendor and to give him an additional remedy in case of default by the purchaser.[5] The vendor still has his remedies of foreclosure and of rescission *independent of the forfeiture clause or provision for liquidated damages.* But if vendor asks for foreclosure of the purchaser's equity, he must proceed as in foreclosure and the purchaser be given such time as to the court shall seem equitable for redemption.[6] This is true even though the statutory period for mortgage redemption does not apply, and if the vendor asks for rescission, as distinct from forfeiture under his contract provision therefor, he must account for all payments and improvements made by the purchaser, less his provable damages.[7] This additional remedy provided by the forfeiture and liquidated damage clauses is distinct from the vendor's right to foreclose the purchaser's equity because upon exercise of vendor's agreed right of forfeiture there is no lien to be foreclosed. It is distinct from an action for rescission because it seeks the enforcement rather than the annulment of the contract.[8]

The impossibility of estimating in advance the damage which vendor may suffer from breach of contract, due to fluctuating values of real estate and to depreciation from neglect or misuse, makes stipulation as to damages in such contracts valid and particularly appropriate.[9] Further, as was said in *Bilz v. Powell,*[10] quoting from *Crisdee v. Bolton:*[11] " 'Courts have said that the law relative to liquidated damages has always been in a state of great uncertainty; and that this has been occasioned by judges endeavoring to make better contracts for parties than they have made for themselves.' " And again in the same case: " 'A court of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses. Our office is to ascertain

[4]Johnson v. Feskens, 146 Ore. 157, 31 Pac. (2d) 667, 107 A. L. R. 340 (1934).
[5]27 R. C. L. 613, sec. 367, 66 C. J. 1210, sec. 1071.
[6]66 C. J. 1337. Barnard v. Huff, 252 Mich. 258, 233 N. W. 213, 77 A. L. R. 259 (1930).
[7]27 R. C. L. 663, 2 BLACK, RESCISSION, 1127.
[8]See Note 94 A. L. R. 1239, *et seq.*, distinguishing forfeiture, foreclosure and rescission.
[9]15 Am. Jur. 684, Glock v. Howard & Wilson Colony Co., *supra* note 2.
[10]50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847 (1911).
[11]14 Eng. C. L. Rep. 547.

the intent of the parties, and, if not contrary to law, to carry their intent into execution.' "

The proper procedure for enforcement of the provision for forfeiture is held to be by suit to quiet title if vendor is still in possession, or by ejectment if the purchaser is in possession, and under our Colorado law, proceeding is also proper under the forcible entry and detainer statute.[12]

The question of enforcement of such contract provisions came before the Colorado courts in *Gordon Tiger Mining Company v. Brown*.[13] There the contract was made for sale of mining property whereunder purchaser was to pay off liens of $60,000.00, erect a mill within six months, operate the property and pay a percentage of the profits to vendor until a total price, including the liens assumed, of $200,000.00 was paid. The contract provided that conveyances were to be delivered upon final payment, that in case purchaser determined the property could not be worked profitably, then possession should be surrendered, the escrowed deeds and agreement should be cancelled and all moneys paid and improvements added to the property forfeited as liquidated damages, in case of failure to comply. The purchaser took possession and paid liens of $49,000.00, but failed for two years to erect a mill or to operate except by extending tunnels, uncovering ore and erecting a boarding house. Then vendor brought suit for possession, return of escrowed papers and forfeiture of payments and betterments made under the contract. Defendant urged that a court of equity never enforces a forfeiture but it was there held that the relief granted, while in a sense a forfeiture, "is nothing more than an enforcement of the provisions of the contract between the parties", and further, that "When, by a contract for the sale of real property the vesting of title is made to depend upon conditions precedent, with the provision that a failure to comply with such conditions shall operate as a forfeiture of the rights of the vendee, then his failure to perform such conditions operates as a forfeiture of his rights."

The contract involved in *Phares v. Don Carlos*[14] contained no provision for forfeiture or liquidated damages. Accordingly, while the court quieted vendor's title by removing the cloud of the recorded contract, it refused to forfeit the payments made and allowed vendor only such damages as he might be able to prove because, "Forfeitures * * * will only be enforced when the strict letter of the contract so requires."

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[12]American Mortgage Co. v. Logan, 90 Colo. 157, 7 P. (2d) 953 (1932), and cases there cited.

[13]56 Colo. 301, 138 Pac. 51 (1914).

[14]71 Colo. 508, 208 Pac. 458 (1922).

The contract involved in *Roller v. Smith*[15] provided for forfeiture and liquidated damages upon vendor's election and his giving notice of election to the purchaser. Decree of forfeiture was recognized by the court as proper on vendor's election to forfeit, but a decree of forfeiture below was reversed because vendor had not himself declared his election to forfeit.

In *Pope v. Parker*[16] the contract contained no provision for forfeiture or liquidated damages. It only authorized vendor on default *to go on the land and sell it at public sale,* making him a mere mortgagee.

Then came the much discussed case of *Fairview Mining Corporation v. American Mines & Smelting Company.*[17] There an option on mining property had by acceptance and part payment become a contract of purchase. As stated in the opinion[18] time was not made of the essence and there was no specific provision for forfeiture. Of a total purchase price of $150,000.00 only $64,000.00 was unpaid. This balance was due October 15, 1928, and upon default in payment, plaintiff vendor attempted immediate forfeiture and in less than 30 days thereafter brought suit in ejectment. Defendant purchaser by answer set up its contract and part performance and other equitable defenses to which the trial court sustained a general demurrer. On error, the trial court was reversed, ejectment denied and plaintiff required to foreclose as a mortgagee.

Some statements in the opinion in this case have been urged as authority beyond the facts involved. The decision on the facts as found by the court in no wise denies the right of enforcement of forfeiture when provided for in the agreement and when time is essential; rather, this case is authority that when there is no specific provision for forfeiture in the agreement the court will not insert one. The court might well have further said that where time is not of the essence, an attempted forfeiture on the very due date will not be enforced, but that in such case reasonable notice must be given to make time essential.[19]

Again the question came before our court in *American Mortgage Company v. Logan,*[20] where Justice Butler, speaking for the court *en banc,* reviewed its prior decisions, quoted the applicable rule from *Gordon Tiger Mining Company v. Brown, supra,* and quoted also with approval from *Mesa Market Company v. Crosby*:[21]

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[15]76 Colo. 371, 231 Pac. 656 (1925).
[16]84 Colo. 535, 271 Pac. 1118 (1928).
[17]86 Colo. 77, 278 Pac. 800 (1929).
[18]At page 83.
[19]66 C. J. 762-3; POMEROY, EQUITY JURISPRUDENCE (5th ed.), sec. 1408.
[20]*Supra* note 12.
[21]174 Fed. 96 (C. C. A. 8th, 1909).

" 'A provision in a contract for the sale of real estate, under which the purchaser is given possession, that if he shall make default in the performance of any of his engagements the vendor may resume possession and terminate all rights of the purchaser, and that in such case the contract shall become one of lease, and any payments by the purchaser or improvements made on the property shall be considered as rental, is valid and enforceable.' "

Further said the court:

"Even if there were equities entitling the mortgage company to such relief, the court would not decree a foreclosure, as in the case of mortgages. The utmost that the mortgage company, in such case, could claim would be a reasonable time after default in which to perform its agreement and thereby prevent a forfeiture."

The decision in the *American Mortgage Company* case is particularly noteworthy, not only because it was *en banc* and without dissent, but because after considering the case the court handed down one opinion sustaining the forfeiture but failing specifically to declare the applicable law supporting it. Then the Denver Bar Association discussed the question and opinion and its practical importance was so stressed that the court withdrew the original opinion and substituted the one reported, which specifically declares the rule in Colorado that the court will not relieve against a forfeiture except in case of the usual equitable defenses; that the language used in the *Fairview* case must be "considered in connection with the facts", and that the contract of purchase before it "was not a mortgage, or in the nature of a mortgage, or in effect a mortgage."

Then again the question came before the court in *Rocky Mountain Gold Mines v. Gold, Silver and Tungsten, Inc.*,[22] involving the same mining property as in the *Fairview* case and a lease and option which was prepared by counsel with the particular purpose of making a forfeitable contract in the light of the *Fairview* case and which by payments had merged into a contract of sale. This contract by its terms made time of the essence and provided for forfeiture in case of default. There was default in payment and vendor had given notice of forfeiture as provided for and then brought ejectment. Purchaser pleaded his contract and large payments thereunder, but no equitable defense or even intent to pay is shown. The trial court sustained the forfeiture but was reversed on review. In its opinion, the court (with a vigorous dissent by the late Mr. Justice Bouck) considered that since the purchaser had paid slightly more than one-half of the purchase price he had "substantially performed" and thereby there was "breathed into" the legal language of the

[22]104 Colo. 478, 93 P. (2d) 973 (1939).

contract "an equity superior to its terms" and plaintiff must foreclose as a mortgagee. So the contract provision for forfeiture was ignored and *Pope v. Parker*,[23] which contained no forfeiture clause and merely authorized the vendor in case of default "to enter upon the premises and sell at public sale" is cited as authority. The rule of "breathed equities superior to the terms of a contract" is a novel doctrine and would appear to mean in common language that when a purchaser has half performed a contract he is no longer bound by it.

The *Fairview* and *Rocky Mountain Gold Mines* cases, like the *Gordon Tiger* case, involved promotional and speculative mining properties. Had those properties possessed substantial values, after the payment and improvements made, they could have been readily refinanced. Such properties and option contracts stand in a class by themselves.

Now we come to the *Cavos v. Geihsler* case,[24] which appears to complete the evolution or dissolution of the rule in Colorado. Here the agreement provided for sale of a residence property in Denver for $4,500.00, of which $3,000.00 was to be paid by assumption of an incumbrance and the balance of $1,500.0 by monthly payments, with immediate possession by the purchasers. The making of payments was a condition precedent to conveyance; time was made essential, and there was express provision for forfeiture and retention of payments as liquidated damages. After more than five years of possession and many months of default, while purchasers rented the property for $40.00 per month and did not even pay the rental received on the contract and while vendor advanced money out of his pocket to pay taxes and interest on the mortgage, vendor gave notice of intended forfeiture as provided in the contract and then brought action for possession and forfeiture. The purchasers owed vendor more than the $1,500.00 they had originally agreed to pay him for his equity and their only defense was that they had paid nearly $800.00 on the principal of the mortgage. The court found that this created a sufficient interest to entitle purchasers to an equity of redemption. The provision for forfeiture was ignored; *Pope v. Parker* was again invoked as involving the same legal principle and vendor relegated to an action for foreclosure. Even the statutory period for redemption on mortgage foreclosure was held to apply, but vendor was denied the right to a deficiency judgment, contrary to the rule in most jurisdictions.[25]

Under this decision the purchaser is given every advantage and the vendor all the risk under a contract for sale on installments, and the attorney in Colorado must advise his client that in Colorado he cannot

[23] *Supra* note 16.
[24] *Supra* note 1.
[25] 27 R. C. L. 597; Barnard v. Huff, *supra* note 6.

safely sell property on monthly payments unless the purchaser can pay down a sufficient sum to protect him against long delay in payment, and for taxes, interest, depreciation and costs of foreclosure and then he must for safety give a deed and take back a deed of trust as security. Otherwise, he is likely to have the greater delay and expense of foreclosure through court without right of recovery for damage to his property or for attorney fees, or deficiency judgment. By this decision the court is not protecting from imposition but is abetting a poor loser in refusing performance of his fairly made contract.

From the practical standpoint, this prevents the sale of many properties and deprives those without substantial resources from purchase of homes, except through government subsidy.

*Cavos v. Geihsler* was decided in department with one dissent, so that it is the voice of a minority only of the court, while *American Mortgage Company v. Logan* was decided *en banc*, without dissent. It is to be hoped that the applicable law in Colorado may be further clarified.

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## Otero County Bar Association Elects Officers

The Otero County Bar Association, at a meeting held at La Junta, elected D. D. Potter of Rocky Ford as its president for the coming year; Robert R. Sabin of La Junta, as vice-president, and Mrs. Elizabeth Guyton of Rocky Ford, secretary. Mrs. Guyton is a new member of the Otero County Bar Association, having taken over the practice of W. L. Gobin at Rocky Ford. Her husband, Sergeant W. F. Guyton, is stationed at the La Junta Air Base.

Two members of the Otero County Bar Association, W. L. Gobin of Rocky Ford and Lawrence Thulemeyer of La Junta are now in the armed forces of the United States.

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## Government Agency Offers Jobs to Lawyers

A government agency has a number of positions open for men holding law degrees, between ages of 23 and 36 years. Applications will be received by secretary of Colorado Bar Association at 812 Equitable Building, Denver. Applicants must be American citizens and be willing to be assigned anywhere in the United States. Minimum pay is $3,200 per year. The position is probably permanent.